IN THE

Supreme Court of the United States

October Term 1960

No. 35

WATERMAN STEAMSHIP CORPORATION, *Petitioner*

v.

DUGAN & MCNAMARA, INC., *Respondent*

BRIEF FOR RESPONDENT

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RESPONDENT'S BRIEF

COUNTER-STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

I. Did the Supreme Court of the United States in its decision entitled *Crumady v. Joachim Hendrik Fisser* (1959), 358 U. S. 423, 79 S. Ct. 445, 3 L. Ed. 2d 413, overrule its prior decision in *Halcyon Lines v. Haenn Ship Ceiling and Refitting Corporation* (1952), 342 U. S. 282, 72 S. Ct. 277, 96 L. Ed. 318?

Answered NO by the majority opinion of the United States Court of Appeals for the Third Circuit.

II. Did the Supreme Court of the United States in its decision entitled *Crumady v. Joachim Hendrik Fisser* (1959), 358 U. S. 423, 79 S. Ct. 445, 3 L. Ed. 413, strike down the force and effect, absent a contractual warranty,

of section 905 of the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. A., §901 et seq.?

Answered NO by the majority opinion of the United States Court of Appeals for the Third Circuit.

III. Did the Supreme Court of the United States in its decision entitled *Crumady v. Joachim Hendrik Fisser* (1959), 358 U. S. 423, 79 S. Ct. 445, 3 L. Ed. 413, reject, overrule or impair the force and effect of the reasoning of the United States Court of Appeals for the Third Circuit in *Brown v. American-Hawaiian Steamship Company* (3d Cir., 1954), 211 F. 2d 16, and *Crawford v. Pope & Talbot* (3d Cir., 1953), 206 F. 2d 784?

Answered NO by the majority opinion of the United States Court of Appeals for the Third Circuit.

IV. If any or all of the answers to the first three questions is or are YES, then the question is

May a shipowner sued in a diversity civil action recover indemnity from an independent stevedoring contractor where neither the shipowner nor the ship are responsible for the discharge of the cargo at the port of discharge, are not responsible and do not pay for such discharging, are both strangers to the contract entered into by the stevedoring company, and neither are in privity of contract, either express or implied in fact?

Answered NO by the majority opinion of the United States Court of Appeals for the Third Circuit.

V. How can any court be expected to hold as a matter of law that a shipowner as a third party is beneficiary under a contract without having before it all the terms of the contract whether written or oral, passes comprehension.

VI. Where admittedly the stowage of the cargo by the ship was faulty and which fault admittedly rendered the

vessel unseaworthy [This is alleged by the Petitioner in its own pleadings and was offered in evidence], may the shipowner recover indemnity from the stevedoring concern which went aboard the ship at and under the directions and orders of the cargo owners as consignee, and where the consignee, as owner of the cargo, in its own behalf and for its own benefit, made an extensive written agreement with the stevedoring company to discharge all of its cargo and to pay for such discharge without designation of any ship, vessel or owner and with the designation that the stevedore would use especially proper equipment for the consignee and use the pier under the control of the cargo owner as consignee, and where the owner, as consignee, had full and complete responsibility for the discharge of the cargo, and where the owner, as consignee, had full and complete responsibility for the accruing of demurrage, including lay time cause by strikes, lockouts, harbor congestion, bad weather, and where the cargo owner, as consignee, assumed full and complete responsibility for damage to the ship and damage to the cargo while being discharged.

Answered NO by the majority opinion of the United States Court of Appeals for the Third Circuit.

COUNTER-STATEMENT OF THE CASE

The original plaintiff, Jasper King, on June 11, 1954, filed a complaint (R. 1) seeking recovery for injuries which occurred on or about August 9, 1952 (R. 4). In February of 1956, petitioner filed a third party complaint against respondent (R. 1). In October of 1956, petitioner asked for and was granted leave to file an amended third party complaint (R. 2).

Jasper King, a longshoreman, sustained injuries when a vertical column of sugar bags about seven feet high collapsed while he and his fellow employees were discharging cargo abroad the *SS. Afoundria* while berthed in the Port of Philadelphia, Pennsylvania, U. S. A. The sugar bags had been stowed in San Carlos, Negros Island, in the Philippines, by a stevedore of the ship, unrelated and unconnected in any way with the instant Respondent stevedore or owner as consignee, about thirty-five days prior to the time the original Plaintiff, Jasper King, was injured. The bags, which contained raw sugar, were about three feet long and eighteen to twenty-four inches wide. When laid flat they were approximately fifteen inches thick. The bags were stowed parallel and run athwartship.

In the original Complaint by Jasper King alleged against the Petitioner, that his injuries were caused by the unseaworthiness of the *SS. Afoundria* and the negligence of her crew resulting from an unseaworthy or unstable stow which created an unsafe and hazardous place in which to work. (R. 4)

Specifically, Jasper King, a longshoreman, alleged in his pleading that Petitioner

> "allowed and permitted said cargo of sugar to be stowed in such a negligent and careless manner as to constitute a danger to plaintiff and other workmen unloading said cargo" and "failing to warn the plaintiff and other workmen of the dangerous and defective

stowage of the cargo of sugar" and "permitting plaintiff and other workmen to commence unloading operations in a dangerous place of employment." (R. 4)

The Petitioners Amended Third Party Complaint alleged inter alia,

> "While Jasper King and others were removing bags from a location about six feet aft of the forward bulkhead, one or more bags fell from the top of one tier and struck Jasper King, causing the various severe personal injuries mentioned in the complaint. The only condition attributable to the vessel which could have been material in connection with this accident was the placing or shifting of a bag at or near the bottom of the exposed tier in such a position that the bags above it would not be firmly supported when reached by the longshoremen, which condition must have existed in order to produce the aforesaid accident. . . ." (R. 8, 9).

In paragraph 4 of the Petitioner's Amended Third Party Complaint it is alleged:

> "The unseaworthy condition of the stow which was created by the shifting or improper placing of a bag at or near the bottom of the exposed portion of the vertical tier from which the bag or bags fell involved absolutely liability on the part of the Waterman Steamship Corporation as defendant in the original action brought against it by Jasper King as plaintiff. . . ." (R. 9)

The Respondent's Answer to the Amended Third Party Complaint averred that the

> "manner and methods in which the bags were stowed caused the vessel to be unseaworthy and was the underlying cause of the accident." (R. 10, 11)

The respondent in its Amended Answer to the Amended Complaint of the Petitioner averred:

FIRST DEFENSE

"Third-party defendant Respondent is the employer of Jasper King, the plaintiff in this case, and the accident which is the subject of the litigation occurred under circumstances making the third-party defendant responsible to the said plaintiff for benefits under the Longshoremen's and Harbor Workers' Compensation Act, as amended, 33 U. S. C. A. Sec. 901 et seq. Sec. 5 of said Statute, 33 U. S. C. A. Sec. 905, provides that upon payment of compensation under the provisions of the said statute, third-party defendant is discharged of all liabilities to the plaintiff or any other person otherwise entitled to bring suit against the third-party defendant. Third-party defendant asserts that benefits under the said Longshoremen's and Harbor Workers' Act have been tendered and accepted by the plaintiff. Third-party defendant therefore alleges that the said statute is the complete defense to the Amended Third-Party Complaint and therefore prays that the action be dismissed as to the Third-party defendant."

SECOND DEFENSE

"To the extent that the amended Third-Party Complaint purports to set forth a cause of action against third-party defendant by way of indemnity the third-party defendant denies that there is any contract upon which indemnity may be founded."

THIRD DEFENSE

"The Amended Third-Party Complaint fails to state any ground for relief and fails to set forth any cause of action against the third-party defendant upon which relief can be granted, and therefore the Amended Third-Party Complaint must be dismissed."

SUMMARY OF ARGUMENT

A shipowner may not recover as a joint tortfeasor, via the way of indemnity, from the stevedoring corporation for injuries to its longshoremen where the shipowner originally as its responsibility and obligation improperly loaded a cargo in such a careless and dangerous manner as to cause the ship to be unseaworthy and which unseaworthiness is the underlying cause of the injuries and where the shipowner was not intended to be and was not responsible for the discharge of the cargo, was not responsible for or intended to be responsible for the expenses to be paid to the stevedore for such discharge, and who did not pay such expenses. The shipowner had no relation, contractual or otherwise, with the stevedore for the discharge of the cargo. The stevedore received and followed the orders for the discharge of the cargo from the owner as consignee. The stevedore was to use, and did use, specially manufactured equipment of the owner as consignee designed for this particular cargo and the consignee, as owner, was obliged to and did use its pier and pier facilities as owner and consignee. The owner, as consignee of the cargo, determined and paid the stevedore waiting time, overtime, sick benefits, social security, old age insurance benefits and determined the hiring and discharging of the stevedore. The contract was on a long term basis for the discharge of the owner's cargo. The contract between the cargo owner, as consignee, was strictly between the cargo owner, as consignee, and the stevedore with respect to damages to the cargo and with respect to damages to the ship during the discharge of the cargo. The ship had no title or interest in the cargo except the right to call upon the cargo owner, as consignee, for demurrage which may arise from excess lay time and to be paid therefor. The cargo owner, as consignee, was and is responsible to the ship for delays in the discharge of the cargo, work stoppages, strikes, walk-outs, sit-downs, harbor congestion, bad weather, quarantine conditions, or

for any reason not exempted in the bill of lading or charter party which gave to the ship owner the right, and only the right, to be paid for demurrage in excess of the granted lay days.

The only relief which petitioner may possibly obtain is a new trial.

ARGUMENT

QUESTION NO. I

I. Did the Supreme Court of the United States in its decision entitled *Crumady v. Joachim Hendrik Fisser* (1959), 358 U. S. 423, 79 S. Ct. 445, 3 L. Ed. 2d 413, overrule its prior decision in *Halcyon Lines v. Haenn Ship Ceiling and Refitting Corporation* (1952), 342 U. S. 282, 72 S. Ct. 277, 96 L. Ed. 318?

Answered NO by the majority opinion of the United States Court of Appeals for the Third Circuit.

The majority opinion of the United States Court of Appeals for the Third Circuit, 272 F. 2d 823, at p. 826, stated their conclusions with respect to the first question as follows:

> "Thus, the actual holding of the Crumady case seems to be that a contractual undertaking of the stevedore with the operator of a ship, who is not the owner, to unload in a safe and workmanlike manner inures to the ship. In contrast the case now before us affords no basis for finding or assuming that the operator of the ship had any dealing whatever with the stevedoring company which discharged the cargo. To the contrary, as already pointed out, the District Court indicated and counsel have represented that the carriage was on such terms and conditions that the consignee was responsible for the discharge of its own

goods and arranged with the stevedoring company for the performance of that job. The shipowner and the stevedoring company were strangers. It necessarily follows that the alleged duty upon which the present claim rests can only be an imposition on a wrongdoer in invitum. It is a question of tort liability, rather than one of contract or warranty, whether either wrongdoer must share the burden of a recovery by the injured party against the other wrongdoer. In reality we have here a problem of contribution between tortfeasors and not one of indemnification for breach of warranty. And the Supreme Court has clearly ruled that in these stevedore injury cases the shipowner may not require contribution from the stevedoring company. Halcyon Lines v. Haenn Ship Ceiling and Refitting Corp., 1952, 342, 72 S.Ct. 277, 96 L. Ed. 318."

Justice Black, speaking for the Supreme Court of the United States in *Halcyon Lines v. Haenn Ship Ceiling and Refitting Corporation* (1952), 342 U. S. 282, at page 285 stated (footnotes omitted):

"In the absence of legislation, courts exercising a common-law jurisdicition have generally held that they cannot on their own initiative create an enforceable right of contribution as between joint tortfeasors. This judicial attitude has provoked protest on the ground that is it inequitable to compel one tortfeasor to bear the entire burden of a loss which has been caused in part by the negligence of someone else. Others have defended the policy of common-law courts in refusing to fashion rules of contribution. To some extent courts exercising jurisdiction in maritime affairs have felt freer than common-law courts in fashioning rules, and we would feel free to do so here if wholly convinced that it would best serve the ends of justice.

"We have concluded that it would be unwise to attempt to fashion new judicial rules of contribution and that the solution of this problem should await congressional action. Congress has already enacted much legislation in the area of maritime personal injuries. For example, under the Harbor Workers' Act Congress has made fault unimportant in determining the employer's responsibility to his employee; Congress has made further inroads on traditional court law by abolition of the defenses of contributory negligence and assumption of risk and by the creation of a statutory schedule of compensation. The Harbor Workers' Act in turn must be integrated with other acts such as the Jones Act (41 Stat 1007, 46 USC §688), the Public Vessels Act (43 Stat 1112, 46 USC §§781-790), the Limited Liability Act (RS §4281, as amended, 46 USC §§181 et seq.) and the Harter Act (27 Stat 445, 46 USC §§190-195). Many groups of persons with varying interests are vitally concerned with the proper functioning and administration of all these Acts as an integrated whole. We think that legislative consideration and action can best bring about a fair accommodation of the diverse but related interests of these groups. The legislative process is peculiarly adapted to determine which of the many possible solutions to this problem would be most beneficial in the long run. A legislative inquiry might show that neither carriers, shippers, employees, nor casualty insurance companies desire such a change to be made. The record before us is silent as to the wishes of employees, carriers, and shippers; it only shows that the Halcyon Line is in favor of such a change in order to relieve itself of a part of its burden in this particular lawsuit. Apparently insurance companies are opposed to such a change. Should a legislative inquiry convince Congress that a right to contribution among joint tortfeasors is desirable, there

would still be much doubt as to whether application of the rule or the amount of contribution should be limited by the Harbor Workers' Act, or should be based on an equal division of damages, or should be relatively apportioned in accordance with the degree of fault of the parties.

"In view of the foregoing, and because Congress while acting in the field has stopped short of approving the rule of contribution here urged, we think it would be inappropriate for us to do so."

In the opinion in the *Halcyon* case written by Mr. Justice Black, all of the Justices with the exception of two concurred that there could be no contribution in joint tort-feasor non-collision maritime cases. Mr. Justice Reed and Mr. Justice Burton were of the opinion that contribution ought to be allowed up to 50%. Just what has occurred to devitalize the *Halcyon* case. Congress has not legislated and if the Executive branch of the government thinks that the Longshoremen's and Harbor Workers' Compensation Act should be amended, they are in a position to present such a recommendation to Congress. Likewise, the Supreme Court has appointed a committee with respect to suggested revisions of the Supreme Court Admiralty Rules. It appears to be obvious that the Executive branch of the government could make appropriate recommendations to Congress and hearings could be had on it. It does not seem appropriate that the Executive branch of the government should join in the request that this court should legislate in the matter when it was already said within nine years ago that it was not appropriate for them to so do.

With respect to the holding in the *Crumady* decision, supra, it should be pointed out that the majority opinion of the Supreme Court makes it clear and it so stated that its decision was based upon *Ryan Stevedoring Co., Inc., v. Pan-Atlantic Steamship Corporation* (1956), 350 U. S. 124, 76 S. Ct. 232, 100 L. Ed. 133. Mr. Justice Douglas, speaking

for the majority of this court in the *Crumady* case, stated:

> "We think this case is governed by the principle announced in the Ryan case", 358 U. S. 423, 428, 3 L. Ed. 2d, 413, 417.

The *Ryan* case did not hold that an operator of a ship, the owner of a ship, the charterer of a ship, the agent of a ship, or the ship itself could recover indemnity on the basis of a tort in disregard of the exclusionary effect of the Harbor Workers' Act, without reliance upon a contract.

The Supreme Court in the *Ryan* case points clearly to the effect that the shipowner's responsibility is based upon a breach of warranty, 350 U. S. 124, 132. The Court specifically stated that the steamship owner in that case

> "relies entirely upon petitioner's [Ryan Stevedoring Company] contractual obligation," and "we [the Supreme Court of the United States] do not meet the question of a non-contractual right of indemnity or of the relation of the Compensation Act to such a right."

The majority opinion further stated:

> "The ship owner's claim here also is not a claim for contribution from a joint tortfeasor. Consequently, the considerations which led us to the decision in *Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp.*, 342 U. S. 282, 96 L. Ed. 318, 72 S. Ct. 277, are not applicable."

The force and effect to be given to these statements of the majority opinion of the Supreme Court in the *Ryan* case is best pointed up by the dissenting opinion written by Mr. Justice Black, in which he was joined by the Chief Justice, Mr. Justice Douglas and Mr. Justice Clark. It will be observed upon a cursory examination of the *Ryan* case that that decision was not based upon the absence of the

contractual obligation and was not based upon a ruling to strike down the force and effect of the Harbor Workers' Act, absent a contractual warranty implied by law arising from a contract.

It would appear that where the Supreme Court in the majority opinion of the *Ryan* case expressly stated that its decision was not based upon absence of contract and that it did not reach the exclusionary effect of the Compensation Act, that such was its reasoning. Therefore, when this Court subsequently, as it did in the *Crumady* case, stated that such subsequent decision was based upon the *Ryan* case, it does not seem logical or warranted or necessary to place a meaning upon such later decision as suggested by the Petitioner. The *Crumady* decision now should be unanimously rejected by this Court.

QUESTION NO. II

II. Did the Supreme Court of the United States in its decision entitled *Crumady v. Joachim Hendrik Fisser* (1959), 358 U. S. 423, 79 S. Ct. 445, 3 L. Ed. 413, strike down the force and effect, absent a contractual warranty, of section 905 of the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. A., §901 et seq.?

Answered NO by the majority opinion of the United States Court of Appeals for the Third Circuit.

Section 5 of the Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1426, 33 U. S. C. A., §905, provides:

> "Sec. 905. Exclusiveness of Liability. The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of

such injury or death, except that if an employer fails to secure payment of compensation as required by this chapter, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under this chapter, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, nor that the employee assumed the risk of his employment, nor that the injury was due to the contributory negligence of the employee."

The majority opinion of the Third Circuit with respect to the effect of the *Crumady* decision on the above statute, declared at page 826:

"We find no indication that the Supreme Court in the Crumady case intended to abrogate or disregard the distinction between a permitted recovery-over based on contract and a prohibited misuse of the concept of indemnity to obtain contribution from a tortfeasor who enjoys the protection of the Longshoremen's and Harbor Workers' Act. We cannot square a recovery in this case with adherence to that distinction."

QUESTION NO. III

III. Did the Supreme Court of the United States in its decision entitled *Crumady v. Joachim Hendrik Fisser* (1959), 358 U. S. 423, 79 S. Ct. 445, 3 L. Ed. 413, reject, overrule or impair the force and effect of the reasoning of the United States Court of Appeals for the Third Circuit in *Brown v. American-Hawaiian Steamship Company* (3d Cir., 1954), 211 F. 2d 16, and *Crawford v. Pope & Talbot* (3d Cir., 1953), 206 F. 2d 784?

Answered NO by the majority opinion of the United States Court of Appeals for the Third Circuit.

With respect to this question, the majority opinion of the Third Circuit stated (footnote omitted):

> "How this case might have stood had the stevedoring company been employed by the owner or operator of the ship to unload the cargo in question we need not and do not decide. For appellant neither alleged in its third-party complaint nor sought to prove any contractual relation or undertaking as the basis of the alleged liability. Rather, as an affirmative defense, appellee in its answer asserted that there was no contract between these parties. The correctioness of this allegation was stipulated at trial. Whatever arrangement was made for unloading the cargo, the shipowner was not party to it and on the present record claims no standing under it.
>
> "The District Court ruled that in such a situation as this the absence of a contractual relation between the parties is fatal to the indemnity claim. We have said as much in Brown v. American-Hawaiian S.S. Co., 3 Cir., 1954, 211 F. 2d 16, 18 and Crawford v. Pope & Talbot, Inc., 3 Cir., 1953, 206 F. 2d 784, 792. Any obligation of a stevedoring company to indemnify a shipowner for shipboard injury of its employees in the course of their employment must be bottomed on a promise, express or implied in fact, of the stevedoring company. Otherwise, tort liability would be imposed upon the stevedoring company for negligent injury of its employee, a result prohibited by the Longshoremen's and Harbor Workers' Act, 33 U.S.C.A. Sec. 901 et seq. However, it is strongly urged that the Supreme Court in Crumady v. The Joachim Hendrik Fisser, 358 U. S. 423, 79 S. Ct. 445, 3 L. Ed. 2d 413, has rejected the reasoning and impaired the authority of the Brown and Crawford cases."

In *Brown v. American-Hawaiian Steamship Corporation* (3d Cir., 1954), 211 F. 2d 16, 18, the Court declared (footnotes omitted):

"There is, however, one aspect of the present appeal which requires further refinement. Appellant suggests that irrespective of the contractual relations between third-party plaintiff (owner) and third-party defendant (employer) in this type of suit, a right of indemnity exists where the liability of the former is secondary or passive while that of the latter is primary or active. Such a problem would be posed, for example, where the owner is held liable to a plaintiff-employe for a condition of unseaworthiness created by the employer's negligence and there is no contract, express or implied, between them, or, if such contract exists, it cannot be read to lay the groundwork for an indemnification claim. In answer to this suggestion we repeat what we thought had been made clear by the Crawford case: there can be no action of indemnity in these cases which is not based on the violation of some contractual duty. Were the rule otherwise the employer could be made to respond indirectly in tort for damages for which he would not be answerable under the Longshoremen's and Harbor Workers' Act. Such a rule would be violative of Section 5 of the Act as well as of the spirit of the entire statute whereunder an employer's duty to pay compensation to his injured employees without regard to negligence is substituted for his common law tort liability. Cf. Pope & Talbot, Inc. v. Hawn, 346 U. S. 406, 412, 74 S. Ct. 202."

In Note 6 to the *Ryan* case, supra, page 132, the Supreme Court wrote:

"6. We do not reach the issue of the exclusionary effect of the Compensation Act upon a right of action of a shipowner under comparable circumstances without reliance upon an indemnity or service agreement of a stevedoring contractor. See Brown v. American-Hawaiian S.S. Co. (CA 3d Pa.) 211 F. 2d 16, 18; . . ."

That Court had previously in *Crawford v. Pope & Talbot* (1953), 206 F. 2d 784, declared the same principle and the Supreme Court of the United States affirmed the same principle in *Pope & Talbot v. Hawn* (1953), 346 U. S. 406, 98 L. Ed. 143, 74 S. Ct. 202. See also page 146 of Mr. Justice Black's dissenting opinion in the *Ryan* case.

QUESTION NO. IV

IV. If any or all of the answers to the first three questions is or are YES, then the question is

> May a shipowner sued in a diversity civil action recover indemnity from an independent stevedoring contractor where neither the shipowner nor the ship are responsible for the discharge of the cargo at the port of discharge, are not responsible and do not pay for such discharging, are both strangers to the contract entered into by the stevedoring company, and neither are in privity of contract, either express or implied in fact?

Answered NO by the majority opinion of the United States Court of Appeals for the Third Circuit.

What has heretofore been said with respect to Questions I, II and III, and particularly with respect to Question III, is complete and adequate rejection of Question IV. It may also be appropriate that the dissenting opinion in *Crumady v. Joachim Hendrik Fisser*, supra, written by Mr. Justice Harlan and concurred in by Mr. Justice Frankfurter and Mr. Justice Whittaker be called to this Court's attention.

Mr. Justice Harlan wrote in the dissenting opinion re *Crumady v. Joachim Hendrik Fisser*, et al., (1959) supra, as follows:

"Since my views have not prevailed, however, I am bound to consider the indemnity issue in light of the Court's reasoning in the action for unseaworthiness. In this light I must again dissent. As I read Ryan Stevedoring Co. v. Pan-Atlantic S. S. Corp., 350 U. S. 124, 100 L. Ed. 133, 76 S. Ct. 232, the ship is entitled to indemnity only if the liability-inducing-unseaworthiness or hazardous working condition is created by the stevedore. Here, on the Court's premises, Nacirema merely brought into play an unseaworthy condition created by the vessel itself. And on the Court's further premise that this condition was the cause of the injuries sustained by Crumady, I think neither the decision nor the underlying principles in Ryan justifies the award of indemnity. Cf. Weyerhaeuser S. S. Co. v. Nacirema Operating Co., 355 U. S. 563, 568, 2 L. Ed. 2d 491, 494, 78 S. Ct. 438."

It will be recalled by this Honorable Court that in the *Ryan* case, the court was first evenly divided four and four. However, Mr. Justice Harlan was thereafter shortly appointed to this Honorable Court. The *Ryan* case was restored to the docket and reargued. Mr. Justice Harlan made the fifth member of a majority court. In the *Ryan* case, the Chief Justice, Mr. Justice Douglass and Mr. Justice Clark joined in the dissent written by Mr. Justice Black. Had Mr. Justice Harlan voted with the minority, it would have become the majority, and the *Ryan* case would have never become the law of the land. However, we now have a situation where Mr. Justice Harlan and Mr. Justice Frankfurter, who joined in the majority opinion in the *Ryan* case, now writes, and we believe correctly so, that they do not believe the *Ryan* case or the *Weyerhaeuser* case is authority for the decision in the *Crumady* case. That is the exact position of the Respondent. It is respectfully urged that neither the *Ryan* case nor the *Weyerhaeuser* case is authority for the principle that where the ship's own

stowage rendered the ship unseaworthy, that a shipowner may recover from the stevedore, nor is it authority for the proposition that a stevedore is liable if it brings into play such unseaworthy stowage condition created and caused by the ship. It is equally respectfully suggested that the *Crumady* decision dealing with third party beneficiaries is purely dictum and that the authorities relied upon do not sustain the principle enunciated in the *Crumady* case. This is so because the contract in the *Crumady* decision (transcript of record in the *Crumady* case, p. 97) is clear beyond reasonable mental difference that the agreement was made and entered into between

> "the Insular Navigation Company, as owner, operator, charterer or agent"

for the named ship and the stevedoring company as contractor. The contract specifically named the vessel, specifically provided the scheduled arrival at the Port of Newark, it specifically gave the rates and dealt with all the matters under the situation. It is specifically signed on behalf of the Insular Navigation Company, owner, operator, charterer, agent by C. J. Smith and it was likewise signed by the stevedoring contractor.

In the *Ryan* stevedoring case, in addition to what is hereinafter referred to in the analysis of that case, in the clear, unequivocal words of the majority opinion, stated:

> "This obligation is not a quasi contractual obligation implied in law or arising out of a non-contractual relationship." 350 U. S. at p. 133.

An examination of the *Weyerhaeuser* case, where there are no dissents, in an opinion written by Mr. Justice Clark, it is stated:

> "Petitioners claim for indemnity primarily rests on contractual relationship between it and respondent." 350 U. S. at p. 565.

Again, this entire Court, including those who participated in the *Crumady* case, did not dissent or disagree with the Court in the *Weyerhaeuser* case, where it stated:

> "If in that regard Respondent rendered a substandard performance which led to foreseeable liability of the Petitioner, the latter was entitled to indemnity ABSENT CONDUCT ON ITS PART SUFFICIENT TO PRECLUDE RECOVERY." (Emphasis supplied.) 355 U. S. 567.

In concluding the *Weyerhaeuser* opinion, this court unanimously agreed that:

> "In view of the new trial to which petitioner is entitled, we believe sound judicial administration requires us to point out that in the area of contractual indemnity, in application of the theories of active or passive, as well as primary or secondary negligence is inappropriate. Ryan Stevedoring Co. v. Pan-Atlantic S.S. Co., supra." 350 U. S. at p. 132-133.

In the *Weyerhaeuser case*, the Honorable Levenworth Colby, of Washington, D. C., argued the cause for the United States as Amicus Curiae. In Mr. Colby's brief, pp. 1801-1802, U. S. Supreme Court Reports, Lawyer's Edition, Annotated, will be found this statement:

> "Since the contractor's liability to the customer is of a purely contractual nature, it can be defeated only if the customer has breached a contract duty owed by it to the contractor."

Again, at p. 1802, is found the following:

> "The concept of active and passive or primary and

secondary, tortous conduct or negligence, developed in the law of quasi contractual or tort indemnity have no validity in this area of contract. Ryan Stevedoring Co. v. Pan-Atlantic S. S. Corp., 350 U. S. 124, 100 L. ed. 133, 76 S. Ct. 232. See also Seawright v. Garcia Cia Ltda. (D. C. P.) 138 F. Supp. 881."

It is difficult to square the Petitioner's and the Government's argument in this case with the cases of *Ryan* Stevedoring and *Weyerhaeuser.*

QUESTION NO. V

V. How may any court be expected to hold as a matter of law that a shipowner is a third party beneficiary under a contract without having before it all the terms of the contract whether written or oral, passes comprehension?

There is no possible legal foundation or basis for a third party beneficiary claim on behalf of the Petitioner, but even if such a basis existed the Petitioner completely failed in the proof of the terms of the contract. The words of Judge Swan, in the case of *THE LIZZIE D. SHAW*, 95 F. 2d 65, at page 67, put at rest any argument about the rights of a third party beneficiary without such person first proving the terms and conditions. Judge Swan stated:

"How a libelant can hope to recover on a contract, even if made for its benefit, without offering proof of the terms of the contract sued upon, passes comprehension. But, even if this hurdle were jumped, the fact remains that the contract between the Hughes corporation and the respondent was not made for the libelant's benefit. The Hughes corporation, having contracted with National to provide carriage at a freight rate of 70 cents per ton, for its own profit procured the respondent to do the work for 65 cents per ton. Recent

decisions of this court are clear authority that the libelant may not recover on the respondent's contract with James Hughes, Inc. The Castleton (C. C. A.) 64 F. (2d) 11, 13; Fat-Top Fuel Co. v. Martin (C. C. A.) 85 F. (2d) 39, 41, certiorari denied 299 U. S. 585, 57 S. Ct. 110, 81 L. Ed. 431. The case of New Jersey Steam Nav. Co. v. Merchants' Bank, 6 How. 344, 12 L. Ed. 465, is not to the contrary. There Harnden, who made the contract of carriage, was treated as the bank's agent and the bank was allowed to sue in its own name as the undisclosed principal. 6 How. 344, at page 380, 12 L. Ed. 465. Here the Hughes corporation, whose contract the libelant seeks to enforce, was not employed by the libelant; there was no agency." Certiorari denied, 302 U. S. 764.

QUESTION No. VI

VI. Where admittedly the stowage of the cargo by the ship was faulty and which fault admittedly rendered the vessel unseaworthy, may the shipowner recover indemnity from the stevedoring concern which went aboard the ship at and under the directions and orders of the cargo owners as consignee, and where the consignee, as owner of the cargo, in its own behalf and for its own benefit, made an extensive written agreement with the stevedoring company to discharge all of its cargo and to pay for such discharge without designation of any ship, vessel or owner and with the designation that the stevedore would use especially prepared equipment for the consignee and use the pier under the control of the cargo owner as consignee, and where the owner, as consignee, had full and complete responsibility for the discharge of the cargo, and where the owner, as consignee, had full and complete responsibility to ship owner for the accruing of demurrage, including lay time caused by strikes, lockouts, harbor congestion, bad weather,

and where the cargo owner, as consignee, assumed full and complete responsibility for damage to the ship and damage to the cargo while being discharged?

Even should the court believe that questions I to V inclusive do not bar the Petitioner from a recovery from the Respondent in this case, the Petitioner is barred because of fault on its own part in improperly stowing the cargo.

The majority opinion of the Circuit Court in this case stated (R. 21):

> "However, appellant claims indemnity from the stevedoring company on the theory that primary responsibility for the accident and an obligation to indemnify the shipowner should be imposed on the appellee because the immediate cause of the accident was appellee's negligence in unloading the cargo, improper though the stowage admittedly was."

The original plaintiff alleged that Petitioner had improperly stowed the cargo. The Petitioner alleged that it had *improperly stowed the cargo.* It conceded that such alleged improper stowage caused the vessel to be unseaworthy. These facts are averred in the Petitioner's own pleadings. In the Ryan Stevedoring case the stevedore had agreed in writing to and did do the loading at the port of origin as well as the discharging at the port of discharge. Liability was placed upon Ryan because of the fact that Ryan improperly stowed the cargo at the port of loading. Liability was not imposed upon Ryan because it failed at the port of discharge to discover the faulty stowage. In that case the majority of the court said, 350 U. S. 134:

> "Whatever may have been the respective obligations of the stevedoring contractor and of the shipowner to the injured longshoreman for proper stowage of the cargo, it is clear that, as between themselves, the

contractor, as the warrantor of its own services, cannot use the shipowner's failure to discover and correct the contractor's own breach of warranty as a defense. Respondent's failure to discover and correct petitioner's own breach of contract cannot here excuse that breach."

It is the holding of the *Ryan* case that the stevedore was responsible to the ship because Ryan improperly stowed the cargo at the port of loading. In the case which this court is now considering the Respondent did not stow the cargo and Respondent was not responsible in any way for the stowage. The Petitioner itself was responsible for the loading of the cargo and was, and is, responsible for the improper stowage. This case is converse of the *Ryan* case. The principle of improper stowage enunciated in the *Ryan* case sustains the Respondent's position. The Petitioner has its right indemnity, if any, in fact and in law against the stevedore which stowed the cargo in San Carlos, Negros Island in the Philippines.

The defective and dangerous stowage of the cargo which rendered the ship unseaworthy was, and is, the responsibility of the Petitioner. It is not even suggested and cannot be argued with a scintilla of accuracy that the Respondent, who contracted with the owner consignee to remove the cargo, had anything to do, directly or indirectly, with the improper stowage of the cargo. Nor is it suggested, and it cannot be accurately stated, that the Respondent was legally responsible, directly or indirectly, for such faulty stowage.

If this court intended in the *Crumady* case to overrule the *Ryan* case then it is respectfully urged and suggested that this court should not have stated in its majority opinion that the *Crumady* case was ruled by Ryan.

In the case of *Hagans v. Farrell Lines, Inc. v. Lavino Shipping Company*, 237 F. 2d 477 the principal of mutual rights in this class of cases is well stated. At page 482 the court wrote:

"The instant case presents the converse of the Ryan situation. Here, the shipowner, Farrell, was held responsible in the district court to the injured longshoreman because of a defective winch, i. e., unseaworthiness or a negligent failure to furnish a safe place to work. But the stevedoring contractor, Lavino, had not undertaken to perform Farrell's non-delegable duty, nor did Lavino create the defective condition. To the contrary, Farrell assumed an express obligation running to Lavino to furnish adequate winches in good order, and, as the evidence shows, to maintain and repair them.

"[5] Upon the analogy of the above cited decisions, it results that Lavino, had it paid its employee on account of injuries sustained, would be entitled, if this were all to the case, to be indemnified by Farrell therefor. Mowbray v. Merryweather, supra; Restatement, Contracts, Section 334. A fortiori, Farrell is not entitled to indemnity from Lavino. Thus, in American Mutual Liability Ins. Co. v. Matthews, supra, it was said:

"In the case at bar no promise by the employer can be implied that he will not use equipment furnished him by the shipowner to be used for the very purpose to which it was put. Nor can a promise be implied that he will use care to detect any defect in the equipment which patently existed when the equipment was delivered for use by the employer. To imply such a promise would mean that the employer agreed to protect the shipowner against liability arising out of the shipowner's own negligence. In the absence of an exxpress promise, such an implication would be utterly unreasonable." 182 F. 2d 322, 324.

"[6] Accordingly, it can only be concluded that Hagans' injury is the result, as the jury found, of Farrell's own conduct, which at once violated its duty

to the longshoreman and to Lavino. As held in the Ryan decision, supra, the promisor cannot use the promisee's failure to discover and correct the promisor's own breach as a defense. See, Restatement, Restitution, Section 93, and Comment a.

"Farrell, however, bases its claim to indemnity upon the asserted neglect of Lavino, first, in using the winch knowing its condition to be defective, and second, upon the conduct of the hatchman, Oliver, in signalling the draft out of the hold without making certain Hagans was no longer in its path.

"Knowledge of and acquiescence in the existence of a defective appliance or condition may prevent the fruition of the right to indemnity. Restatement, Restitution, Sections 93 and 95, and Reporters' Notes. But it does not necessarily follow that the burden to indemnify is thereby created.

"[7] Where the parties have violated similar duties to the injured person, neither is entitled to relief against the other. Union Stock Yards Co. v. Chicago, B. & Q. R. Co., 1905, 196 U. S. 217, 25 S. Ct. 226, 49 L. Ed. 453. Absent the compensation act, and hypothesizing the legal impossibility of contribution, the independent neglect of Lavino to Hagans would qualify Lavino as a joint tort-feasor with Farrell, in which event Farrell could not recover either contribution or indemnity. Restatement, Restitution, Section 102. But, as we have already stated, Farrell's right to indemnity must arise out of the legal relationship between it and Lavino, and not out of the relationship to the employee. To this proposition we are previously committed by our decisions in the Brown and Crawford cases, supra; see also, Slattery v. Marra Bros., Inc., supra.

"Here, Farrell was under a continuing responsibility to Lavino for the good order and maintenance of the winches. It fell down on the job. Indeed, it went

further, for its repairman gave Lavino affirmative approval of the equipment in the presence of a ship's officer. At most, Lavino used the defective winch only a few times in the hour and a half which intervened between commencement of the use and the accident to Hagans. We see nothing in this situation which should require Lavino to indemnify Farrell. McKay v. Pedigree Fabricks, Inc., Sup. 1947, 74 N.Y.S. 2d 386. Farrell's complaint that the hatchman erred in signalling the draft out of the hold before ascertaining that Hagans was out of the way does not amount to other than contributing neglect; except for the fact that the hatchman tripped on his way across the deck, he would have had adequate time to warn Hagans. Nothing in the record suggests intentional or reckless conduct on the part of Lavino which would permit the conclusion that Lavino's violation of duty toward Farrell supersedes Farrell's violation of duty toward Lavino. See Restitution, Section 97.

"Reliance by Farrell upon cases which characterize the conduct of the indemnitor as the "sole", "active" or "primary" cause, does not assist, for as stated, the indemnitor was held to have brought about the condition or defect for which the indemnitee was charged. Here, the ground upon which Farrell was held liable to Hagans was its own doing; as between Farrell and Lavino, Farrell had assumed the responsibility. If anything, Lavino only contributed to the happening of the accident. But if Lavino failed to perform its work properly, we are constrained to hold that, in the face of mutual violations, Farrell is not entitled to full indemnity, and, of course, it cannot have contribution."

The case of *MacPherson v. Buick Motor Corporation*, 217 N. Y. 382, is authority in a tort case that the injured party may recover *directly against* the manufacturer of a

dangerous product. The Buick case is not authority in this class of cases for the proposition asserted by the Petitioner. It was a negligence case—Cardozo, *J.*, stated page 385:

> "The charge is one,——of negligence".

As indicated above this court recently wrote in the *Weyerhaeuser* case:

> "If in that regard Respondent rendered a substandard performance which led to foreseeable liability of the Petitioner, the latter was entitled to indemnity ABSENT CONDUCT ON ITS PART SUFFICIENT TO PRECLUDE RECOVERY". (Emphasis supplied). 355 U. S. page 567.

An analysis of the Petitioner's pleadings demonstrates clearly that the bag which caused the collapse of the tier was the bag which had been improperly placed, or shifted, at the bottom of the tier. Under the Petitioner's own statement of this case, its acts were those which caused the injury to the original plaintiff, or at best contributed to that injury as a joint tort-feasor.

It is provided by the rules of this Court that the Government may file a brief for the United States as Amicus Curiae without first obtaining the consent of the parties. It is respectfully suggested that the brief of the Government is not helpful, but, on the contrary, it is confusing as to the policy of the executive departments of the United States.

The administration of the American Merchant Marine, owned by the Government of the United States, has been entrusted to the Maritime Division of the Department of Commerce. The Secretary of Defense, as well as Secretary of the Navy and the Secretary of Labor, are vitally concerned when it comes to the question of our Merchant Marine in the matter of national defense and security. In its Amicus Curiae Brief, the Government failed to give the Court the benefit of the policy position of the Maritime

Commission or the executive department's position with respect to the various bills placed in Congress dealing with the question of the responsibility in this class of cases. The suggestion that the United States has an interest in this question is undoubtedly true, but it is doubted that the executive departments of the Government of the United States have arrived at and issued a policy with respect thereto. The Respondent wishes, of course, that the Court should have the benefit of the policy positions of the various executive departments of the Government of the United States with respect to the issue of joint tortfeasors in this class of cases. The brief does not give the Court the benefit of the testimony of any of the personnel of the executive departments which have the administration of the Merchant Marine under their supervision, nor does it give the Court any help with respect to the number of bills that have been introduced in Congress with respect thereto, and whether or not hearings have been held, and what was the policy stated by the Maritime Division of the Department of Commerce.

It is not believed that the rule intended the Department of Justice to throw the weight of the United States on one side or the other with respect to a lawsuit between private parties. The far reaching effect of the suggestion contained in both Petitioner's brief and that of the Amicus Curiae has already been answered by this Court in the *Halcyon* decision.

Some of the national, as well as the international, problems and the background of our Merchant Marine are outlined in the May issue of 1960 of the *Columbia Law Review*, page 712. If the Maritime Commission and other executive departments, including Labor and Defense, actually are in favor of the abolition of the *Halcyon* decision, the rules provide that their representatives may appear and file a brief with the Court. If they do not favor it and Congress has not yet determined upon it, it is respectfully suggested that the brief Amicus Curiae be considered in that light.

It appears that the underlying chief complaint of both

the brief of the Petitioner and that of the Amicus Curiae is that the rulings of this Court on the question of unseaworthiness and liability of the ship therefor are too harsh. The suggestion by the Petitioner and by the Amicus Curiae brief is, or appears to be, a desire to shift such non-delegable responsibility for seamen and for longshoremen to the stevedoring companies.

The indulgence of the brief Amicus Curiae and the assertion of facts admittedly not of record, but which could have been accurately ascertained and properly placed in evidence, does not appear to the Respondent to be helpful or to the best interest of anyone.

With respect to the so-called strict ruling by this Court as to unseaworthiness and non-delegable duty of the vessel, this question could be disposed of very easily by the executive departments, including that of the Department of Justice, making proper recommendations to the Congress of the United States for legislation pertaining thereto.

The argument on page 5 of the Amicus Curiae brief seems to urge that this Court should extend further the *Crumady* decision so as to permit a ship's claim to be asserted directly against the stevedore without any proof of contractual rights and obligations of the respective parties and without regard to the limitations and restrictions in the Longshoremen's and Harbor Workers Act. The Amicus Curiae brief bases the necessity for such an extension of the *Crumady* case on the ground that it would avoid circuity of suits, i.e., the shipowner would have to sue the United States or other consignee or consignor who hired the contractor on his contract of carriage with the shipowner, and then the consignee or consignor in turn would have to seek recovery on its contract with the stevedore. This argument must fall because the Federal Rules of Civil Procedure permit a defendant, or defendants, to bring in third party defendants, and likewise the Supreme Court Admiralty Rules permit the filing of cross-libels and the impleading of other parties respondent. It is submitted that such a

procedure is far better than a hazardous guess as to the terms of the bill of lading, the terms of the charter party, whether it be a time charter, voyage charter or private contract. It would be better to have the terms of the contract between the purchaser of the cargo and the ship, the owner of the ship and the cargo, the receiver of the cargo, and the terms of the contract of the owner of the cargo with the stevedore all before the Court. In reality, what this Court is being asked to do is to not only strike down the exclusionary provision of the Longshoremen's and Harbor Workers' Act, but to strike down the entire basis of the Act. If that is the policy of the executive departments of the Government, it should go to Congress for such legislation. It should not ask this Court to legislate.

The brief Amicus Curiae, Note 5, page 10, admits that the record is barren of the obligation of the parties, but suggests that probably the ship and its owners are creditor beneficiaries. It is not believed that it was the intention of this Court when it promulgated the rule permitting the Government to file a brief Amicus Curiae to lend its great weight to the aid of a private party in litigation on assumptions not of record and which the majority opinion of the Court of Appeals declared did not exist.

The tenor of the brief Amicus Curiae is that the Respondent was hired for the purpose of performing work and responsibilities of the ship to discharge the cargo. The expression, did not hire directly, used in both the Petitioner's brief and that of the Amicus Curiae appears to wish to make this Court believe that the stevedore was hired indirectly by the ship to do the discharging. Again, the majority opinion ruled twice that this innuendo was ill founded and no effort has been made by anyone to ask leave to put in evidence to sustain the correctness of that innuendo. It is submitted that the assumption by the brief Amicus Curiae that the Respondent was hired in this case to perform work and responsibilities in the discharge of the cargo was incorrect and totally unsupported by any evi-

dence. It is not helpful to refer to historical situations and then to ask this Court to try to predicate a far reaching decision upon facts and contracts which are completely different than the historical situation.

In passing, it may be noted that the Honorable Levenworth Colby, in his briefs before this Court in cases of this class declared that indemnity was not based upon negligence. The brief of Amicus Curiae in reality is urging this Court to adopt a principle not in keeping with either the *Ryan* stevedoring case or the *Weyerhaeuser* case and in direct conflict with the *Halcyon* decision. It is submitted that the holding of the majority of the Third Circuit was that the stowage was admittedly faulty and that the shipowner asserted none and claimed no rights under the contract between consignee and stevedoring contractor. It is not alleged in the Petitioner's pleadings—and of course it would not be true—that the contract with the stevedore was made for the ship. It is not alleged by the Petitioner that the ship was responsible for the unloading and discharge of the cargo. It is not alleged by the Petitioner that the ship assumed any responsibility, directly or indirectly, for the discharge of the cargo.

On page 6 of the Amicus Curiae brief, it is argued:

> "When a stevedoring contractor goes aboard a ship to perform the shipowner's requirements . . . contractor warrants that it will perform its service competently and safely."

The stevedoring contractor did not go aboard this ship to perform the shipowner's stevedoring requirements. This is a pure assumption without foundation and it was so declared by the majority opinion of the Court of Appeals. The National Sugar Refining Company has offices in Philadelphia. It could have been sued in Philadelphia. In fact, both it and the Respondent could have been sued by the Petitioner in this litigation but such was not done.

In the first majority opinion filed by the Court of Ap-

peals, in which six of the Judges concurred, the Court of Appeals declared (R. 21):

> "How this case might have stood had the shipowner employed the stevedoring company to unload the cargo in question we need not and do not decide. For appellant neither alleged in its third-party complaint nor sought to prove any contractual relation between shipowner and stevedoring company. Rather, as an affirmative defense, appellee in its answer asserted that there was no contract between these parties. The correctness of this allegation was stipulated at trial. Thus, whatever arrangement was made for unloading the cargo, the shipowner was not party to it and claims no benefit under it."

Thereafter, the Court of Appeals, on the basis of the *Crumady* case, granted a rehearing on April 7, 1959 (R. 31). The case was reargued on October 9, 1959, and the majority of the Court of Appeals, in its last opinion, stated (R. 33):

> "How this case might have stood had the stevedoring company been employed by the owner or operator of the ship to unload the cargo in question we need not and do not decide. For appellant neither alleged in its third-party complaint nor sought to prove any contractual relation or undertaking as the basis of the alleged liability. Rather, [fol. 286] as an affirmative defense, appellee in its answer asserted that there was no contract between these parties. *The correctness of this allegation was stipulated at trial.* Whatever arrangement was made for unloading the cargo, the shipowner was not party to it and on the present record claims no standing under it." (Emphasis supplied.)

It will be recalled that the Petitioner, after the District Court (Judge Clary) directed a verdict against it,

did not file any post-trial motions with that Court and has not from that day to this made any attempt of any nature to place the charter party, bill of lading and stevedoring contract in evidence.

Something might be said in respect to the question of third-party beneficiaries, even though, as noted in *THE LIZZIE D. SHAW*, supra, it passes comprehension how a party may claim the benefits of a contract without proving its terms and conditions. In view of the availability of the owner, as consignee, in the very same district as the Respondent, one may draw one's own conclusions as to why those contracts were not subpoenaed and not asked for, and why counsel for the Petitioner stipulated that there was no privity of contract.

The case of *Isbrandsten Co. Inc. v. Local 1291 of International Longshoremen's Ass'n*, 204 F. 2d 495, involved a suit on a contract by one not a party to it.

Isbrandsten Company was the time charterer of a ship called the NYCO. Isbrandsten in turn chartered the ship to the Scott Paper Company for the purpose of transporting pulp from Nova Scotia to Philadelphia. Under the terms of the charter party, the Scott Paper Company was to load and unload the vessel. Scott Paper Company in turn hired the Lavino Shipping Company to do the unloading. When the vessel got to its destination, the employees of Lavino started to unload it and during the unloading stopped work contrary to the provisions of the contract which their union had with their employer. The parties to the contract were the Philadelphia Marine Trade Association, of which Lavino Shipping Company was a member, as collective bargaining agent for those of its members who employ longshoremen, and Local 1291 of the International Longshoremen's Association. The contract provided, among other things, that there was to be no work stoppage pending arbitration of disputes which might arise. Isbrandsten, alleging that the delay in unloading the ship caused it damage, sued under Section 301(a) of the Labor Management

Relations Act of 1947. Alternatively it claimed, there being diversity of citizenship and the requisite jurisdictional amount, to be able to recover as a matter of common law. An able and learned discussion of the rights of third parties ~~When the vessel got to its destination, the employees of La-~~ is given in the opinion of the United States Court of Appeals for the Third Circuit. That Court, composed of Judges Maris, Goodrich and McLaughlin, Goodrich writing the opinion, concluded that there was no liability, the court stating at page 497:

> "We see no possibility that Isbrandsten can be a creditor beneficiary of this labor union. The labor union was a complete stranger to Isbrandsten so far as this transaction is concerned. Neither owed the other anything. And, therefore, there was no obligation on the part of either to do anything to or for the other. Nor do we see any possibility of making out of this situation a donee beneficiary relationship. This is not like a contract where a father buys an insurance policy to build up an estate for his son. It was a labor contract made between this association and a union. The contract recited that the association was acting on behalf of its members who employ longshoremen. Lavino is one of those members. But it does not appear that either Scott or Isbrandsten was a member, and there is no allegation that either one employed longshoremen.
>
> "There is considerable language in the Restatement and in the cases and decisions about 'intent' and 'accompanying circumstances'. From that the argument is made to us that the court should not have dismissed under Rule 12 but should have heard the plaintiff upon an attempt to make a showing of the supposed intention of the parties with regard to persons to benefit by the contract.
>
> "But we think that the whole setting of this fact situation as described in the complaint and exhibits is one which completely negatives a gift transaction

under any possible interpretation of that term. The contract between the association and the labor union was a usual type of collective bargaining agreement. The contract between Isbrandsten and Scott was a charter party in the ordinary form made upon stated money consideration. We do not have before us a copy of the contract between Scott and Lavino, but the complaint describes it as an agreement whereby Lavino promised Scott to discharge a cargo of wood pulp from the vessel. We cannot think that Lavino was making a gift to Scott or that Scott was making a gift to Isbrandsten. In other words, all the transactions were usual business transactions in which parties were agreeing to do things for and pay money to each other."

The case of *Robins Dry Dock & Repair Co. v. Flint, et al.*, 275 U. S. 303, was a libel by time charterers of the Steamship BJORNEFJORD against the Dry Dock Company to recover for loss of use of the steamer. Libellants recovered in both courts below, a writ of certiorari was granted, and the Supreme Court, by Mr. Justice Holmes, delivered an opinion reversing the two lower courts. The Court said, at page 307:

"The present libel 'in a cause of contract and damage' seems to have been brought in reliance upon an allegation that the contract for dry docking between the petitioner and the owners 'was made for the benefit of the libellants and was incidental to the aforesaid charter party' &c. But it is plain, as stated by the Circuit Court of Appeals, that the libellants, respondants here, were not parties to that contract 'or in any respect beneficiaries' and were not entitled to sue for a breach of it 'even under the most liberal rules that permit third parties to sue on a contract made for their benefit.' 13 F. (2d) 4. 'Before a stranger can avail himself of the exceptional privilege of suing for a breach of an agreement, to which he is not a party, he must, at least show that it was intended for his direct

benefit.' *German Alliance Insurance Co. v. Home Water Supply Co.*, 226 U. S. 220, 230. Although the respondents still somewhat faintly argue the contrary, this question seems to us to need no more words.

The above statement of the law is in consonance with the decisions dealing with contracts for the carriage of goods, discharge of goods and the rights of time charterers, sub-charterers and other parties referred to in the Petitioner's brief. For example, a sub-charter of a vessel, even on the same terms as the original charter, does not create any contract relation between the sub-charterer and the owner; The *BANES*, 221 F. 2d 416. See also *Actieselskabet Dampsk, Thorbjorn v. Harrison Co.*, 260 F. 287; *Dampskibs Aktieselskabet Thor v. Tropical Fruit Co.*, 281 F. 740; *Phosphate Mining Co. v. Unione Austriaca Navigazione Gia Austro-Americana & Fratelli Cosulich Societa Anonima*, 3 F. 2d 239; *THE NORTHERN NO. 29. Flat-Top Fuel Co., Inc. v. Martin*, 15 F. Supp. 543.

Both the Petitioner and the brief as Amicus Curiae apparently go on the basis that a stevedore, regardless of what may be the factual and contractual situation, ipso facto insures the ship in this class of cases.

It is respectfully suggested that the court reëxamine the rulings for which it is now asserted the *Crumady* case stands. It is the opinion of the Respondent that there cannot be any doubt but what the ship was a party to the contract in the *Crumady* case and that the ship had full rights and benefits under it. The contract expressly so provided and regardless of what may have been said or is said to the contrary, the record proves it. The other part of the *Crumady* case with respect to a stevedore's bringing into play an already dangerous and unseaworthy condition of the vessel thereby making the stevedore solely responsible, suggests a further review by this court.

There does not seem to be any necessity to add further to the reasoning of Justice Black in the *Halcyon* decision as to why this court should not take the action urged by the Petitioner, i.e., legislate in re the Longshoremen's and Harbor Workers' Act.

Whether or not the position of the Solicitor General is correct is not for the Petitioner, Respondent or this Court to decide. It is for the Congress of the United States and no one is in a better position to have a hearing before the proper Committees of the House and Senate with respect to such matters than the Executive Departments, including the Department of Justice.

It is respectfully submitted that neither the Executive Department nor this Court under the Constitution of the United States is the Legislative branch of the Government where the Legislative branch has already acted in the matter and stopped short of what the Executive Department now asks this Court to do.

Conclusion

It is respectfully suggested and firmly urged that the decision of the majority of the United States Court of Appeals Third Circuit be unanimously affirmed.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

No. 35.—October Term, 1960.

Waterman Steamship Corporation, Petitioner, *v.* Dugan & McNamara, Inc.	On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

[November 21, 1960.]

Mr. Justice Stewart delivered the opinion of the Court.

The petitioner is the owner of the vessel *S. S. Afoundria*. The respondent is a stevedoring company. A longshoreman employed by the respondent was injured aboard the *Afoundria* while engaged with other employees of the respondent in unloading the ship at the port of Philadelphia. The cargo consisted of bagged sugar. The longshoreman was working in the hold, and his injuries resulted from the collapse of a vertical column of hundred-pound bags which the unloading operations had left without lateral support.

He sued the petitioner in the District Court for the Eastern District of Pennsylvania to recover for his injuries. The petitioner settled the claim and, by way of a third-party complaint, sought to recover from the respondent the amount paid in satisfaction of the longshoreman's claim. The third-party complaint alleged that improper stowage of the cargo [1] had created an unseaworthy condition in the ship's hold which had imposed absolute liability upon the petitioner as shipowner for the longshoreman's injuries, but that "the direct, proximate, active and substantial cause of the accident" had been

[1] The cargo had been loaded in the Philippines several weeks earlier by a stevedore unrelated to the parties to the present proceeding.

the negligence of the respondent, who, by "failing to perform the contracted stevedoring services in a safe, proper, customary, careful and workmanlike manner," had brought the existing unseaworthy condition into play.

As an affirmative defense the respondent stevedore alleged that there had been no direct contractual relationship between it and the petitioner covering the stevedoring services rendered the *Afoundria* in Philadelphia. At the trial the parties stipulated that this allegation was correct, it appearing that the consignee of the cargo, not the petitioner, had actually engaged the respondent to unload the ship. The District Court directed a verdict for the respondent, holding that a shipowner has no right of indemnity against a stevedore under the circumstances alleged in the absence of a direct contractual relationship between them. The Court of Appeals for the Third Circuit affirmed in an *en banc* decision, three judges dissenting.[2] Certiorari was granted to consider whether in a situation such as this the absence of a contractual relationship between the parties is fatal to the indemnity claim. 362 U. S. 926.

In *Ryan Co.* v. *Pan-Atlantic Corp.*, 350 U. S. 124, it was established that a stevedoring contractor who enters into a service agreement with a shipowner is liable to indemnify the owner for damages sustained as a result of the stevedore's breach of his warranty to perform the obligations of the contract with reasonable safety. This warranty of workmanlike service extends to the handling of cargo, as in *Ryan*, as well as to the use of equipment incidental to cargo handling, as in *Weyerhaeuser S. S. Co.* v. *Nacirema Co.*, 355 U. S. 563. The warranty may be breached when the stevedore's negligence does no more than call into play the vessel's unseaworthiness. *Crumady* v. *The J. H. Fisser*, 358 U. S. 423, 429. The fac-

[2] 272 F. 2d 823 (on rehearing).

tual allegations of the third-party complaint in the present case comprehend the latter situation.

In the *Ryan* and *Weyerhaeuser* cases considerable emphasis was placed upon the direct contractual relationship between the shipowner and the stevedore. If those decisions stood alone, it might well be thought an open question whether such contractual privity is essential to support the stevedore's duty to indemnify. But the fact is that this bridge was crossed in the *Crumady* case. There we explicitly held that the stevedore's assumption of responsibility for the shipowner's damages resulting from unsafe and improper performance of the stevedoring services was unaffected by the fact that the shipowner was not the party who had hired the stevedore. That case was decided upon the factual premises that the stevedore had been engaged not by the shipowner, but by the party operating the ship under a charter. The Court's language was unambiguous:

> "We think this case is governed by the principle announced in the *Ryan* case. The warranty which a stevedore owes when he goes aboard a vessel to perform services is plainly for the benefit of the vessel whether the vessel's owners are parties to the contract or not. That is enough to bring the vessel into the zone of modern law that recognizes rights in third-party beneficiaries. Restatement, Law of Contracts, § 133. Moreover, as we said in the *Ryan* case, 'competency and safety of stowage are inescapable elements of the service undertaken.' 350 U. S., at 133. They are part of the stevedore's 'warranty of workmanlike service that is comparable to a manufacturer's warranty of the soundness of its manufactured product.' *Id.*, at 133–134. See *MacPherson* v. *Buick Motor Co.*, 217 N. Y. 382, 111 N. E. 1050.
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> "We conclude that since the negligence of the stevedores, which brought the unseaworthiness of the

vessel into play, amounted to a breach of the warranty of workmanlike service, the vessel may recover over." 358 U. S. 428–429.

This reasoning is applicable here. We can perceive no difference in principle, so far as the stevedore's duty to indemnify the shipowner is concerned, whether the stevedore is engaged by an operator to whom the owner has chartered the vessel or by the consignee of the cargo. Nor can there be any significant distinction in this respect whether the longshoreman's original claim was asserted in an *in rem* or an *in personam* proceeding. In the *Ryan* and *Weyerhaeuser* cases *in personam* liability was asserted. In the *Crumady* case the injured stevedore had brought an *in rem* proceeding. The ship and its owner are equally liable for a breach by the contractor of the owner's nondelegable duty to provide a seaworthy vessel. *The Osceola*, 189 U. S. 158, 175; cf. *Continental Grain Co. v. Barge FBL–585*, 364 U. S. 19. The owner, no less than the ship, is the beneficiary of the stevedore's breach of warranty of workmanlike service.

Accordingly the judgment of the Court of Appeals is reversed, and the case is remanded to the District Court for further proceedings consistent with this opinion.

Reversed and remanded.